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PETITION NOT PRINTED

Nos. 70, 179

In the Supreme Court of the United States

OCTOBER TERM, 1960

THEODORE GREEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
MALCOLM RICHARD WILKEY,
Assistant Attorney General,
BEATRICE ROSENBERG,
JULIA P. COOPER,
Attorneys,
Department of Justice, Washington 25, D.C.

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OPINIONS BELOW

In No. 70, the opinion of the court of appeals is reported at 273 F. 2d 216 (R. No. 70, p. 34) and the opinion of the district court at 24 F.R.D. 130 (R. No. 70, p. 28).

In No. 179, the opinion of the court of appeals is reported at 274 F. 2d 59 (R. No. 179, p. 26); the memorandum of the district court (R. No. 179, p. 2) is not reported.

JURISDICTION

In No. 70, the judgment of the court of appeals was entered on December 8, 1959 (R. No. 70, p. 37); the petition for a writ of certiorari was filed on December

28, 1959, and was granted limited to one question on April 18, 1960 (R. No. 70, p. 38; 362 U.S. 949).

In No. 179, the judgment of the court of appeals was entered on January 20, 1960 (R. No. 179, p. 29); the petition for a writ of certiorari was filed on January 30, 1960, and was granted (and consolidated for argument with No. 70) on June 27, 1960 (R. No. 179, p. 30; 363 U.S. 839).

The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a sentence must be vacated, on motion made seven years after its imposition, on the ground that the court did not invite petitioner personally to speak at the hearing on sentencing, at which counsel was invited and did speak at length on petitioner's behalf.

2. Whether a twenty-five-year sentence for aggravated bank robbery must be vacated on the ground that the court, in simultaneously imposing concurrent sentences for counts of entry, robbery, and aggravated robbery, exhausted its power to sentence after the imposition of sentence on the entry count.

3. Whether a sentence for aggravated bank robbery can be "corrected," on motion made seven years after imposition of sentence, to reflect punishment for simple bank robbery on the ground that the jury was improperly instructed as to the aggravated circumstances.

STATUTE AND RULES INVOLVED

18 U.S.C. 2113 provides in pertinent part:

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association; or
>
> Whoever enters or attempts to enter any bank, or any savings and loan association, or any building used in whole or in part as a bank, or as a savings and loan association, with intent to commit in such bank, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny—
>
> Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.
>
> * * * * *
>
> (d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

* * * * *

Rule 32(a) of the Federal Rules of Criminal Procedure provides:

> SENTENCE. Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or

alter the bail. Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.

Rule 35 of the Federal Rules of Criminal Procedure provides:

> CORRECTION OR REDUCTION OF SENTENCE. The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari.

STATEMENT

On October 22, 1952, petitioner and another were convicted, after a jury trial in the United States District Court for the District of Massachusetts, on a three-count indictment charging bank robbery. Count 1 charged entry with intent to commit a felony, and Count 2 charged robbery, in violation of 18 U.S.C. 2113(a). Count 3 charged assault and the jeopardizing of lives by a dangerous weapon during the course of the robbery, in violation of 18 U.S.C. 2113(d) (R. No. 70, pp. 1–3). On October 27, 1952, petitioner was sentenced to imprisonment for twenty years on Count 1, twenty years on Count 2, and twenty-five years on Count 3, the sentences to run concurrently and to begin upon his release from prison on a state sentence he was then serving (R. No. 70, p. 24).

I. POST-CONVICTION PROCEEDINGS

(a) PRIOR PROCEEDINGS

After sentencing, a notice of appeal was filed and two motions for enlargement of time for filing the record were granted. The trial court ordered that petitioner be permitted to prosecute his appeal *in forma pauperis* and that a transcript be furnished him. On April 17, 1953, the court of appeals ordered that the appeal be dismissed "for want of diligent prosecution" (see the Government's Brief in Opposition, Oct. Term 1958, No. 143 Misc., certiorari denied, 358 U.S. 854).

On April 20, 1956, petitioner filed a motion to vacate sentence under 28 U.S.C. 2255, claiming that he had been denied the right to a fair trial because of the action of the trial judge in allowing the jury to see the original indictment upon which there appeared certain penciled notations by the clerk. Petitioner was allowed to proceed *in forma pauperis*, the district court denied the motion, and the court of appeals summarily affirmed the order of denial on December 10, 1956. *Green* v. *United States*, 238 F. 2d 400.

On January 14, 1958, petitioner filed another motion to vacate sentence, alleging that he had been deprived of his right to a fair trial by the action of the Assistant United States Attorney in persuading government witnesses to give perjured testimony and that he had been deprived of effective assistance of counsel because of collusion between the government attorney and his own counsel. The issues were resolved against

him: *Green* v. *United States*, 256 F. 2d 483, certiorari denied, 358 U.S. 854.

(*b*) PRESENT PROCEEDINGS

(*i*) *No. 70*

Subsequently, petitioner filed, pursuant to Rule 35 of the Federal Rules of Criminal Procedure, the motion to set aside sentence which initiated the present proceeding in No. 70. In that motion he alleged that the judgment was void because his sentence was announced orally by the clerk of the court, rather than by the court, after the clerk and the court had conferred out of his hearing, and that he must be resentenced because the court, before imposing sentence, failed to ask him specifically if he wished to say anything (R. No. 70, p. 27).

Petitioner was permitted to proceed *in forma pauperis*. On June 15, 1959, the district court denied the motion (*United States* v. *Green*, 24 F.R.D. 130; R. No. 70, pp. 28–31). It found nothing improper in the pronouncement of sentence. It questioned whether Rule 32(a) of the Federal Rules of Criminal Procedure required that a defendant, competently represented by counsel, be invited to speak on his own behalf, and it held that in any event petitioner had not shown that if he had been offered the opportunity to speak in person he would have added anything to what his counsel already had said.

The court of appeals affirmed *per curiam* on December 8, 1959 (273 F. 2d 216; R. No. 70, pp. 34–37), noting that, while it might be the better practice for

the trial court, before imposing sentence, to ask the defendant personally if he wanted to make a statement, the court of appeals was not prepared to hold that Rule 32(a) required such personal solicitation when counsel had been given full opportunity to speak and had spoken at length in mitigation of punishment and the matters bearing thereon. The court observed that even now petitioner did not indicate what, if anything, he might have been able to add to counsel's statements.

This Court granted certiorari limited to the question of whether the judgment was invalidated where the court did not offer the defendant an opportunity to speak (R. No. 70, p. 38).

(ii) No. 179

On October 9, 1959, petitioner filed a second motion pursuant to Rule 35 which forms the basis for the issues in No. 179. He alleged (R. No. 179, p. 1) that his sentence on Count 3 was void because (1) the court had exhausted its power to sentence after the imposition of sentence on Count 1, and (2) the trial court did not properly instruct the jury as to the law on Count 3. On October 15, 1959, the district court denied the motion (R. No. 179, pp. 2–3). It held that the matter of the instructions could not be raised in a Rule 35 motion and was, moreover, without merit. As to sentencing, the court held that the judge simultaneously imposed the three concurrent sentences of twenty, twenty, and twenty-five years; and ruled that, while there was authority from which it might be held

that the crimes of entry and robbery in Counts 1 and 2 merged into the crime of aggravated robbery in Count 3, there was no authority or reason for setting aside the twenty-five-year concurrent sentence on that count.

The court of appeals affirmed *per curiam* on January 20, 1960 (*Green* v. *United States*, 274 F. 2d 59; R. No. 179, pp. 26–29). It held that the question of the allegedly erroneous instruction could not be converted into a basis for collateral attack under Rule 35 by the device of alleging that because of the error no responsive verdict could be found. It also held that, while petitioner should have received only a single sentence on the three counts charging entry, robbery and aggravated robbery, the twenty-five-year sentence on Count 3, carrying the greater penalty, was the valid one. The court saw no reason for affording petitioner the "paper satisfaction," not asked for, of vacating the twenty-year concurrent sentences on Counts 1 and 2.

This Court granted certiorari on June 27, 1960, and consolidated the case with No. 70 (R. No. 179, p. 30).

2. THE TRIAL COURT'S INSTRUCTIONS

The trial court, after instructing the jury at length as to general principles of law, explained the three counts of the indictment (R. No. 179, see pp. 4–9). With regard to Count 3, it said *inter alia* (R. No. 179, p. 10):

> The third count with respect to the aggravated aspect of it, whoever, in committing or in an attempt to commit any of these offenses that

> I have already pointed out in these two sections, entering to rob and robbing, whoever committed these offenses, and assaults any person or puts in jeopardy, in danger, jeopardy means, the life of any person by the use of a dangerous weapon, and so forth, may be punished in accordance with the statute.

Shortly thereafter, the court, in repeating the issues before the jury, said (R. No. 179, p. 12):

> Under Count 3, the question is, did they rob the bank under aggravated circumstances, put in fear the life of a person by the use of a pistol?

After instructing at length as to the nature of, and the weight to be given, the evidence, the court then said (R. No. 179, p. 15):

> Now, there are some things in this case I must point out to you, that there is no controversy at all about, and counsel pointed that out to you, counsel for defendants and counsel for Government point out to you. The defendants' counsel do not dispute that a robbery of the Norwood Bank was committed. There is no question on this evidence that a finding that a robbery was committed could be found, and they don't deny that.
>
> What they do deny, that either or both of these defendants, Mr. Juggins for Jacobanis said he was not concerned with the crime, and Mr. Callahan for defendant Green contends that is their position. They say that the defendants they respectively represent were not concerned in the crime but they do agree that the bank was robbed.

> And then there is no contention in respect to the third count of the indictment, that whoever robbed that bank put in jeopardy the lives and the persons who had custody of that money by the use of a dangerous weapon. The evidence in the case pointed to that and counsel for the defense do not dispute that fact so we have those facts to put to one side.

In concluding its charge, the court instructed that the jury would deliberate and return a verdict on each count—Count 1, Count 2, and Count 3.

Defense exceptions went only to the failure to give additional requested instructions on the credibility of witnesses and corroboration of accomplices (R. No. 179, pp. 18–23).

3. THE SENTENCING

After the return of the verdict, the government moved for sentencing (R. No. 179, p. 23). The court, on inquiry of the probation officer, was informed that the narrative probation reports were not complete. The court asked for and received the officer's investigative reports. The following colloquy then took place (R. No. 179, pp. 23–24):

> The COURT: Do the defense counsel want to be heard with respect to any matter at this point?
>
> Mr. CALLAHAN: Judge, so far as the defendant Green is concerned, we are ready for the disposition but I would like to address your Honor on it.
>
> The COURT: Yes, I know, your attitude probably would be the same, Mr. Juggins?

Mr. JUGAINS: Yes, your Honor.

The COURT: I am not quite prepared to sentence the defendants at this moment. The probation reports have just been presented to me. I want to read and study those and I want to give some consideration to the matter of law involved with respect to the counts on which the defendants are found guilty and I will postpone the matter of sentence. I am going to postpone sentence until Monday morning at eleven o'clock. I want to give the matter some thought.

When the court reconvened for sentencing, it heard: first, an argument from defense counsel on a motion in arrest of judgment[1] (denied thereafter); second, a statement from the Assistant United States Attorney on sentencing; and, third, an argument from defense counsel on a motion for a new trial directed toward the weight and sufficiency of the evidence (R. No. 70 pp. 4–18). Then the court asked defense counsel if he wanted to say something. In response, counsel spoke for lenience in sentencing (R. No. 70, pp. 18–19). He informed the court that petitioner was 37 years of age, and had a family—a wife and two children, one fourteen and one nine years of age—whom petitioner had supported except for a period when he was incapacitated by an injury to his arm suffered from a fall in a state prison. Counsel reasoned that, since any sentence imposed on petitioner would prevent his getting parole on a state court sentence of 15½ to 20 years

[1] The motion argued that conviction on Counts 1 and 2 constituted double jeopardy in view of conviction on Count 3.

he was then serving, and since there was a chance that petitioner might be convicted on four other indictments then pending against him, petitioner would be "under lock and key for a good many years" anyway and would be in no condition to commit other offenses.

The court reviewed the evidence (R. No. 70, pp. 21–22), denied the motion for a new trial, and then took up the question of the sentence. It observed that petitioner and his co-defendant were gunmen who, the evidence showed, would not hesitate to kill (R. No. 70, pp. 22–23); pointed out that the two men had persisted in committing armed robbery even after their release from prison on similar offenses; said that in its opinion they would never reform, adding that there was not one word that could properly be said that would warrant the court in believing they could be rehabilitated; and noted that petitioner's criminal record went back to 1931—a record of serious crimes involving the use of guns. The court then pronounced sentence (through the clerk) as follows (R. No. 70, p. 23):

> Theodore Green, the Court orders that on this indictment you be sentenced as follows: On Count 1 of the indictment 20 years, on Count 2 of the indictment that you be imprisoned for 20 years, and on Count 3 of the indictment that you be imprisoned for the period of 25 years, said prison sentence to run concurrent and to begin upon your release from prison upon the sentence you are now receiving under order of the State Court.

SUMMARY OF ARGUMENT

I

A. Rule 32(a) of the Federal Rules of Criminal Procedure does not impose a mandate upon a sentencing court to invite a defendant personally to speak on his own behalf. The requirements of the Rule are met where, as here, counsel for a defendant is invited and does speak at length before sentencing, and where there is no indication by counsel or the defendant that the defendant wishes to be heard further.

1. The language of the Rule does not say that the court "must" or even "shall" ask the defendant anything; it speaks only of *affording* the defendant *an opportunity to* be heard. When the word "defendant" is used in several instances in the Rules it is understood that the defendant will act through counsel. That meaning is likewise appropriate for Rule 32(a).

2. The history of the Rule shows that the wording in question is merely an express recognition of the right of the defendant, through counsel or personally, to present information before sentencing. In our view, the framers of the Rules did not intend to incorporate in all its rigidity the old English practice of *allocutus*, whereby it was indispensably necessary that a sentencing court ask a convicted felon if he had "anything to say" why judgment should not be pronounced against him. *Allocutus* arose in English law at a time when an accused person was not permitted to have counsel to defend him and when it was therefore necessary to ask the convicted person if he

had matters to urge in arrest of judgment or mitigation of punishment. The practice was never enforced strictly in this country except with respect to capital offenses, and even in capital offenses the failure to observe the formality resulted only in the case being remanded for resentencing. Moreover, American courts have held that the right of *allocutus* was exercised once the defendant had moved in arrest of judgment or for a new trial.

In the light of the original purpose of *allocutus* and its limited adoption in this country, there is no reason to conclude that the framers of the Rules, in modernizing and simplifying general criminal procedure for federal felonies and misdemeanors, intended the mild language of Rule 32(a)—that the defendant shall be afforded an opportunity to make a statement in his own behalf—to represent a strengthened reincarnation of the long departed ritual of *allocutus*.

3. In every judicial circuit which has considered the Rule (with the exception of the District of Columbia Circuit which has established its own procedure under the Rule), the law is that once the court (as here) has disposed of all motions pending after verdict, has made an appropriate inquiry (from counsel and reports) into the legal and factual circumstances bearing on sentencing, and has received no indication that the defendant wishes to be heard further, it may sentence in full compliance with the letter and spirit of the Rule. Even the District of Columbia Circuit has held back from a clear pronouncement that the Rule *per*

so requires more, deciding only that, as a matter of its supervisory power, it would *in the future* require district courts to receive assurance directly from the defendant that he does not wish to be heard further.

4. In the present case, there is no doubt that petitioner's trial counsel received full opportunity, which he used, to argue with respect to the sentence, and that neither petitioner nor his counsel indicated in any way that petitioner desired to be heard himself.

B. Even if it be assumed that there had been error in the failure of the trial judge to inquire directly of petitioner if he had anything to say, it would not have been an error that could have been raised collaterally seven years after sentence. The error, if any, was at most a minor procedural defect which would not have furnished grounds for reversal even on direct appeal. It is not cognizable under the narrow remedy afforded by Rule 35 to bring a truly illegal sentence into conformity with the law. Neither is it a fundamental procedural error of unusual character which would furnish a basis for collateral attack under the broader remedy afforded by 28 U.S.C. 2255, as a substitute for habeas corpus.

II

The twenty-five-year sentence on Count 3 is the valid sentence which should be left standing. It is the only sentence which provides punishment for the total offense for which petitioner was found guilty—embracing the two elements of (1) the robbery (or entry with intent to commit a robbery) and (2) the putting of a life in jeopardy during the course of the robbery.

Counts 1 and 2 did not cover the element of putting a life in jeopardy. It cannot be said that the court exhausted its power when it imposed a sentence on those counts since it had not then sentenced for the total crime which the jury found had been committed. The twenty-five-year sentence, moreover, is the sentence which represents the intent of the trial judge as to the punishment merited by the total offense for which petitioner was convicted. Reason and authority both dictate that this obvious intention should be given effect.

III

A. The matter of instructions to the jury with respect to the aggravated form of the offense cannot be raised in a motion to correct sentence under Rule 35. The relief afforded by the first part of that Rule is available only to correct an illegal sentence, one which can be shown to be illegal without resort to the trial proceedings. Trial errors cannot be raised under Rule 35.

Petitioner attempts to hurdle this barrier by his contention that because the instructions failed properly to define the aggravated offense of robbery the conviction on Count 3 must be taken as one for simple robbery subject to a maximum sentence of 20 years. However, the record shows that petitioner was indicted under Count 3 for aggravated robbery, that the jury returned a verdict of guilty on Count 3, and that the sentence imposed was within the maximum provided for aggravated robbery. On the strict record to which relief under Rule 35 is limited, the

conviction was plainly for aggravated robbery; petitioner's attack, no matter how disguised, goes to the instructions, which cannot properly be considered.

B. Likewise, petitioner's challenge to the instructions does not furnish a basis for invoking a remedy under 28 U.S.C. 2255. Instructions, if incorrect, constitute trial error. Petitioner did not pursue his direct appeal and there are no circumstances here which would bring this belated contention within the scope of collateral attack delineated by this Court's decision in *Sunal v. Large,* 332 U.S. 174. The courts of appeals have held unanimously that an attack on instructions cannot be presented under 28 U.S.C. 2255.

C. Finally, petitioner's arguments that the court failed to charge, or require deliberation, as to the aggravated offense of bank robbery are lacking in merit, and would not have furnished grounds for relief even on direct appeal. The jury was told that it must return a verdict as to each of the three counts. Petitioner does not deny that the basic explanation of Count 3 was adequate; the jury was told that jeopardy meant "danger." The one casual reference to "fear" (in another part of the charge) could not have been misleading in view of the whole charge, the contested issues, and the undisputed fact that a pistol (a weapon universally regarded as creating "danger", as well as evoking "fear") was used as the robbery instrument.

ARGUMENT

I

PETITIONER'S SENTENCE WAS NOT INVALID FOR FAILURE TO COMPLY WITH RULE 32(a)

In the first of his current motions under Rule 35 of the Federal Rules of Criminal Procedure (No. 70), petitioner, citing Rule 32(a), contends that the judgment against him is invalid because the trial court, in imposing sentence, did not first invite him personally to speak in his own behalf. It is the government's position that Rule 32(a) imposes no such mandate upon the court, that the letter and the spirit of Rule 32(a) were met when counsel was invited and did speak at length on petitioner's behalf, and that, even if it would have been better judicial practice to have asked petitioner personally if he had anything to say, the failure to do so is not a ground for collateral attack on the sentence.

A. THE REQUIREMENTS OF RULE 32(a) ARE MET WHEN A DEFENDANT, AS IN THIS CASE, HAS HAD A FULL OPPORTUNITY TO BE HEARD THROUGH COUNSEL AND THERE IS NO INDICATION THAT THE DEFENDANT DESIRES TO BE HEARD FURTHER

Rule 32(a) provides:

> Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.

The last sentence of this subdivision—read in the light of its phrasing, its context, and the general

purpose and origin of the Rule—means to us just what its words say, *i.e.*, that the defendant shall have an opportunity to be heard before sentencing. It does not impose an affirmative mandate upon the sentencing court to address a specific invitation to a defendant to speak upon his own behalf.

1. The language of Rule 32(a)

The language of the Rule is significant in that it speaks only of *affording* the defendant *an opportunity* to make a statement in his own behalf or to present information in mitigation of punishment. This wording does not suggest that an opportunity afforded to counsel to speak or to present information is not an opportunity afforded to the defendant. The term "defendant" is used in many instances throughout the Rules where the obvious expectation is that the defendant will act through counsel, as where the Rules set out various procedural steps. See, *e.g.*, Rules 15(d), 16, 17(b), 21, 29. Even with respect to such matters as the entering of a plea of guilty under Rule 11, it is understood that an attorney may act for the defendant in his presence. See *United States* v. *Moe Liss*, 105 F. 2d 144 (C.A. 2); *United States* v. *Dennis-ton*, 89 F. 2d 696 (C.A. 2), certiorari denied, 301 U.S. 709. And, contrary to petitioner's view, the phrase "in his own behalf" does not, of itself, imply that the defendant is to speak personally; this phrase can just as easily be read as indicating the subject-matter to which the defendant's presentation (personally or through counsel) is to be directed.

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Moreover, the Rule does not say that the court "must ask": it does not even say that court "shall ask" the defendant. In this regard it is significant that the framers of the Rules in their Notes to the Preliminary Drafts (see A.L.I. Preliminary Draft, Rule 30, p. 131) invite comparison of this part of the Rule with Section 480 of the New York Code of Criminal Procedure which reads:

> When the defendant appears for judgment, *he must be asked* by the clerk whether he have [*sic*] any legal cause to show, why judgment should not be pronounced against him. [Emphasis added.]

In New York, even this provision has been construed as not entitling a defendant to resentencing where his right and opportunity to be heard were afforded through the plea of counsel. *People* v. *Sheehan*, 4 Misc. 2d 1049, 159 N.Y.S. 2d 932. Certainly, the milder language involved here can reasonably be so construed.

2. The history

The Advisory Committee Notes say only that subdivision (a) of the Rule is substantially a restatement of existing procedure under Rule I of the Criminal Appeals Rules of 1933, 292 U.S. 661.[2] The former

[2] Rule I of the Criminal Appeals Rules of 1933 provided: "After a plea of guilty, or a verdict of guilt by a jury or finding of guilt by the trial court where a jury is waived, and except as provided in the Act of March 4, 1925, c. 521, 43 Stat. 1259, sentence shall be imposed without delay unless (1) a motion for the withdrawal of a plea of guilty, or in arrest of judgment or for a new trial is pending, or the trial court is of the opinion that there is reasonable ground for such a motion;

Rule was concerned with imposition of sentence without delay and with the disposition of motions, presentence investigation, and bail—procedures designed to expedite cases after verdict, while at the same time permitting delay in sentencing until there was a full inquiry into the relevant circumstances. These procedures are preserved in the first two sentences of Rule 32(a). The addition of the last sentence of subdivision (a) was, we think, merely a means of supplementing the inherent power of the court to receive information bearing on sentencing—an express recognition that a defendent has the right to be heard thereon.

The authorities have traced the procedure described in the last sentence of Rule 32(a) to the old English practice of *allocutus*, whereby a court, before sentencing a person convicted of a felony, was required to ask if the person had "anything to say" why judgment should not be pronounced against him. Whitman, *Federal Criminal Procedure* (1950), p. 234; Orfield, *Criminal Procedure From Arrest to Appeal* (1947), p. 540. *Allocutus* had its genesis in English law at a time when a person accused of a felony was not permitted to have counsel to defend him. 5 Holdsworth, *History of English Law* (1931), p. 192; 4 Blackstone, *Commentaries* (1897), p. 375. The invitation to speak was therefore, of necessity, extended to the defendant

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or (2) the condition of the character of the defendant, or other pertinent matters, should be investigated in the interest of justice before sentence is imposed.

"Pending sentence, the court may commit the defendant or continue or increase the amount of bail."

personally. While the purpose of *allocutus* was to give a convicted person an opportunity to move in arrest of judgment or to plead the King's pardon, the practice was that, if he had nothing to urge in bar, he might also speak to facts in mitigation of punishment. 1 Chitty, *Criminal Law* (1847), p. 700. The inquiry was indispensably necessary and its omission was an error requiring reversal. *King* v. *Speke*, 3 Salk. 358, 91 Eng. Rep. 872; *Rex* v. *Geary*, 2 Salk. 630, 91 Eng. Rep. 532.

American courts in the last century upheld the right of *allocutus* only in restricted circumstances. See, generally, 2 Bishop, *Criminal Law* (2d ed. 1913), §§ 1293, 1294. Thus, it was for the most part enforced only with respect to capital offenses. See *Ball* v. *United States*, 140 U.S. 118; *Schwab* v. *Berggren*, 143 U.S. 442, 446–447; *Hamilton* v. *Commonwealth*, 4 Harris 129 (Pa.); *Bressler* v. *People*, 117 Ill. 422, 8 N.E. 62; *People* v. *Nesce*, 201 N.Y. 111, 94 N.E. 655. It was usually held not to be essential before sentence for other felonies. *People* v. *Palmer*, 105 Mich. 568, 63 N.W. 656; *Boehm* v. *State*, 190 Wis. 609, 209 N.W. 730; *Jeffries* v. *Commonwealth*, 12 Allen 145 (Mass.); *State* v. *Sims*, 117 La. 1036; *State* v. *Sally*, 41 Ore. 366. Contra, *Safford* v. *People*, 1 Parker (Cr.) 474 (N.Y.). And *allocutus* was never held to be required before sentence for misdemeanors. *Turner* v. *United States*, 66 Fed. 289; *State* v. *Lund*, 51 Kan. 1; *State* v. *Nagel*, 136 Mo. 45; *Hancock* v. *Rogers*, 140 Ga. 688, 79 S.E. 558.

Some of these earlier decisions questioned the necessity for the continued observance of this formality,

even with respect to capital offenses. In *Boehm* v. *State*, it was said (190 Wis. at 612, 613):

> * * * [I]t [the practice of *allocutus*] seems to have nothing more to support it than its traditionary existence. It is a mere custom and nothing else. In this day, when defendants in criminal cases are represented by counsel,—by counsel furnished by the State if they are unable to procure them,—who understand their legal rights and exert every effort to preserve them, who move in arrest of judgment and for new trials, and perfect their appeals to this court, how can it be said that the mere omission of the traditionary question, "Have you anything to say why judgment should not be pronounced?" constitutes anything like a substantial right? The proceeding has been characterized as "ridiculously idle" (*Warner* v. *State*, 56 N.J.L. 686, 29 Atl. 505); as "a most absurd, frivolous and idle ceremony" (*State* v. *Hoyt*, 47 Conn. 518); and in *People* v. *Palmer*, 105 Mich. 568, 63 N.W. 656, it is said: "Whichever good purpose this practice may have served in England when parties charged with crime were not allowed counsel, it is now a mere idle ceremony." It is time that the law be rid of this technicality, which rests only in tradition and is barren of any substantial benefit to the defendant.

See, also, *State* v. *Hoyt*, 47 Conn. 518;[3] *Dutton* v. *State*, 91 Atl. 417, 421 (Md.).

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[3] In *State* v. *Hoyt*, it was observed, 47 Conn. at 544–545: "If we compare the rules and practice that obtained in England with our own it will readily be suggested that the reasons that made the inquiry of the prisoner so essential do not apply at all in this state. Here the accused has always had

Most of these earlier decisions held that the right tendered by *allocutus* could be waived directly or by implication. It was held, for instance, that the right had been exercised once the defendant had moved in arrest of judgment or for a new trial. *State* v. *Hoyt, supra; Gannon* v. *People,* 127 Ill. 507; *Jeffries* v. *Commonwealth, supra,* 12 Allen 145; *State*

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counsel to represent him, vigilant to guard every right and claim every privilege deemed essential to his deliverance. The counsel well know that the verdict does not conclude the prisoner—they know all the remedies for ulterior relief and when and how they must be instituted. They are present when the prisoner, on motion of the Attorney for the State, is set at the bar to receive his sentence. They know that the court is open to hear any request, motion or objection, and that if the accused desires to say anything the court will grant him the privilege if he or they should so indicate.

"Under our practice what possible harm can be occasioned to the prisoner by such an omission on the part of the court? He can have no pardon to plead, for that can only come from the legislature after sentence, no attainder to save, no benefit of clergy to pray for.

"If he should say anything suggesting ground for some relief, his saying it would not be the remedy; it would have to take on some other legal form and be filed within the time prescribed. If he should in a capital case urge mitigating circumstances and put himself on the mercy of the court, it would avail nothing, because the court would have no discretion to exercise in regard to the punishment. If, as suggested in the argument, a possible utility of such inquiry might be to discover the prisoner's condition of mind as to sanity, we reply, not only that it would have no adaptation to such a purpose, but if it had there is no need of any such expedient under our law, which humanely allows a full year to intervene between the date of the judgment and its execution—affording most ample opportunity for such discovery or for any relief from the consequences of the conviction to which he may be entitled."

v. *Johnson*, 67 N.C. 55; *State* v. *Sally*, *supra*, 41 Ore. 366; *State* v. *Nagel*, *supra*, 136 Mo. 45. Even in those cases where the formality was thought to be necessary or desirable before pronouncement of death, the case was not remanded for a new trial but only for resentencing. *Commonwealth* v. *Preston*, 188 Pa. 429.

While the procedure of *allocutus* was a forebear of the last sentence of Rule 32(a) (see the Notes to the Preliminary Draft, Rule 30, F.R.Cr.P., pp. 131, 132), it seems plain that it was no more than a remote ancestor. The framers of these modern rules, who aimed at simplifying procedures already far removed from the ancient practice, did not intend to reinstate *allocutus* in all of its formal English rigidity. If they had so intended, the languge would doubtless have been more explicit. Note that the drafters invited comparison of their language with that of the mandatory language of the New York Code (discussed p. 20, *supra*), which nevertheless contemplates that counsel may speak for a defendant.[1] Further, the basic reason for adopting the formal practice of *allocutus* fails in our present-day system of criminal

[1] The Notes to the Preliminary Drafts also invite comparison with Section 389 of the American Law Institute Code of Criminal Procedure (1931), which provides that the court (or the clerk) "shall ask him [the defendant] whether he has any cause to show why sentence should not be pronounced." Section 390 of the Code provides that failure to comply with Section 389 shall be grounds for setting aside the sentence, and Section 391 lists the causes that the defendant may show as to why sentence should not be pronounced as being only (a) that he has become insane since the verdict, (b) that he has been pardoned of the offense, (c) that he is not the person against whom the judgment was rendered, (d) if the

jurisprudence. Today, counsel plays a vital part in the defense of an accused. In most cases, being more articulate and less personally involved, counsel is in a better position than the accused to speak with respect to matters of mitigation; and if counsel does wish the defendant to speak personally, he can himself call upon the defendant to do so. There is no obstacle to such a practice. Moreover, under our present procedure, at the time of sentence a convicted person has already had an opportunity to move for a new trial, or in arrest of judgment, or to file exceptions to rulings. Often, his background has been investigated and the pre-sentence report is before the court.[5] It is

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defendant is a woman, and the sentence is death, that she is pregnant.

Section 397 of the A.L.I. Code provides:

"*Inquiry into mitigating or aggravating circumstances.* Where the court has discretion as to the penalty to be inflicted on the defendant it shall, upon the suggestion of either party that there are circumstances which may properly be taken into consideration, hear evidence as to the same summarily in open court, either immediately or at a specified time and upon such notice to the adverse party as the court may direct; or the court may inquire into such circumstances of its own motion."

[5] Rule 32(c) provides:

"*Presentence Investigation.*

"(1) *When made.* The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

"(2) *Report.* The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condi-

very difficult to imagine a situation in which a defendant represented by counsel might suffer from the omission of *allocutus* (in the sense of an express judicial invitation to speak personally).

In view of these considerations, it seems unlikely that the framers of the Criminal Rules would reach back into history to revive in full force an already obsolete ritual, noncompliance with which had been ground for invalidating a judgment, while at the same time making it applicable to misdemeanors (to which it was never applicable at common law) and to felonies not capital in nature (to which it was not extended by most of the common-law courts nor by federal decisions). Significantly, the Notes to the Preliminary Draft (Rule 30, p. 132) direct attention to what was federal law even at that time—the case of *United States* v. *Austin-Bagley Corp.*, 31 F. 2d 229 (C.A. 2), holding that the failure of a court to inquire of a defendant why sentence should not be pronounced (in a non-capital case) was harmless error.

3. The judicial decisions

We conclude from the foregoing discussion (*supra*, pp. 18–27) that, when a court has disposed of all motions pending after verdict and has made an appropriate inquiry into the legal and factual circumstances bearing on sentencing, obtained from investigative reports and from counsel, and has received no indica-

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tion and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the Court."

tion that a defendant wishes to be heard further, it may sentence in full compliance with the letter and spirit of Rule 32.

This is the law in the circuits which have considered this aspect of the Rule, with the exception of the District of Columbia Circuit which has established its own procedure under the Rule. The Tenth Circuit, in *Baird* v. *United States*, 250 F. 2d 735, found that the Rule was complied with when the court had heard counsel and had granted several continuances in order to obtain pre-sentence information. The court of appeals noted that there was nothing in the record to show that either the defendant or his counsel had been denied the right to present facts in mitigation of punishment. See, also, *Pence* v. *United States*, 219 F. 2d 70 (C.A. 10); *Calvaresi* v. *United States*, 216 F. 2d 891, 901 (C.A. 10), reversed on other grounds, 348 U.S. 961. And the Court of Appeals for the Sixth Circuit, in *Sandroff* v. *United States*, 174 F. 2d 1014, 1020 (C.A. 6), certiorari denied, 338 U.S. 947, observed [in circumstances where the court posed a general inquiry, "Anything further?", and neither the defendant or his counsel spoke up] that it could not say that the defendant was not afforded an opportunity to make a statement since there was nothing to indicate that he was shut off. The court said that, while it would have been in appropriate conformity with the Rule had the court asked Sandroff whether he desired to make a statement, it would appear from his inaction that he did not wish to do so. The Fifth Circuit has observed that *Sandroff*, *supra*, correctly

states the law (while actually holding that the alleged error in complying with the Rule could not be raised in a collateral proceeding under 28 U.S.C. 2255) (*Mixon* v. *United States*, 214 F. 2d 364 (C.A. 5)). Following the same view are *United States* v. *Sousa*, 158 F. Supp. 508, and *United States* v. *Miller*, 158 F. Supp. 261, arising in the Southern District of New York, where the court said (158 F. Supp. at 509, 263):

> When a statement has been made in defendant's behalf by competent counsel and the defendant does not indicate that he would like to add to the statement already made, he cannot later contend that he was not afforded an opportunity to make such a statement.

See also *Stidham* v. *Swope*, 82 F. Supp. 931 (N.D. Cal.).

In *Couch* v. *United States*, 235 F. 2d 519 (C.A.D.C.), the Court of Appeals for the District of Columbia Circuit ruled under its supervisory power that the procedure of asking the defendant personally if he has anything to say should obtain prospectively, as the better practice under the Rule.[4] Even in that decision the court did not make a clear pronouncement that the language of the Rule *requires* such a procedure. The separate opinion of four judges, urging that the language of the Rule imposes a mandate upon the sentencing

[4] See, also, *Gadsen* v. *United States*, 223 F. 2d 627 (C.A.D.C., 1955), where the court, in vacating sentences because counsel was not present in open court for sentencing, stated that the sentencing court had an affirmative duty to ask the accused whether he desired to make a statement. The same court, the following year, in *Hudson* v. *United States*, 229 F. 2d 36 (C.A.D.C., 1956), held that all reasonable requirements of law were met when both counsel and the defendant were present

court to address the defendant personally (yet not dissenting from the holding that the operation of the new procedure was to be prospective only), relies upon what (for the reasons set forth *supra*) we think to be the erroneous position that the history of the Rule requires such a construction. (See, also, the opinion of two judges, concurring in affirmance of the sentence but dissenting from the adoption of the new procedure on the ground that the language of the Rule negates such a construction.) While it might be the better practice, as the District of Columbia Circuit has held, to receive assurance from the defendant that he does not wish to be heard further, there are many instances like the present one where such an inquiry would appear to be an idle gesture. See also the recent opinion of the Court of Appeals for the Ninth Circuit in *Taylor* v. *United States*, No. 16726 (decided December 12, 1960) (sitting *en banc*), in which the majority of the court held that the defendant's right under Rule 32(a) may be waived by counsel, while four judges felt that the right is personal and not waivable by counsel.

4. The present case.

In the instant case, the record shows that the court went to great lengths to afford petitioner every opportunity to be heard before sentencing. The court

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and stood before the bench, and counsel made a brief plea for clemency. And the year thereafter, in 1957, the same court, in remanding a case for a hearing on an allegation of ineffective assistance of counsel, held "moreover" that the defendant must be resentenced because, since counsel did not speak at sentencing, no one was afforded an opportunity to make a statement in defendant's behalf, citing *Gadsen. Jenkins* v. *United States*, 249 F. 2d 105.

refused to impose sentence immediately after verdict even though counsel, invited to speak at that time, indicated that petitioner was then ready for sentence. The judge postponed sentencing in order that probation reports could be completed and studied, and so that he could give some thought to matters of law raised by petitioner in his motion in arrest of judgment. On the date reset for sentencing, the court heard petitioner's counsel in a legal argument on this motion in arrest of judgment, as well as in an argument attacking the weight and sufficiency of the evidence (on petitioner's motion for a new trial). See the Statement, *supra*, pp. 11–12. Before sentencing, the court specifically addressed counsel: "Did you want to say something?" Counsel spoke then of petitioner's family—his wife and two minor children—whom petitioner had supported except for such time as he had been incapacitated. Counsel also alluded to petitioner's age; he reasoned that, because petitioner would be incarcerated for a long time on sentences he was then serving or might face for other crimes, there was no occasion for the imposition of a heavy sentence in this case. Neither counsel nor the defendant, who was no stranger to court proceedings, indicated that either one had anything further to add. Certainly, petitioner and his counsel were afforded full opportunity to speak on behalf of petitioner, and to present any information in mitigation of punishment.

Some seven years later, petitioner for the first time claimed, in a motion brought under Rule 35, that he was not personally invited to make a statement in his

own behalf or to speak in mitigation of punishment.' He has never alleged, and does not now allege, that he wanted to say anything in person, or what, if anything, he might have added to what counsel had already said, or how it would or might have affected the sentence which was imposed. He relies, *simpliciter,* on what he conceives to be the mandatory nature of the requirement he invokes.

In these circumstances, even if there were not full literal compliance with the Rule (which we do not concede), we submit that its spirit was fully met. Petitioner has shown no prejudice and no real reason for the resentencing he seeks. As Judge Dawson aptly observed in *United States* v. *Miller, supra,* 158 F. Supp. 261, 264: "Essentially the defendant seeks to exalt formalism above substantial justice."

B. EVEN ASSUMING THAT THERE HAD BEEN AN ERROR WITH RESPECT TO RULE 32(a), THE ERROR WOULD NOT HAVE RENDERED THE SENTENCE SUBJECT TO COLLATERAL ATTACK

For the reasons set forth above (*supra,* pp. 18–32), we think that, in the circumstances of this case, if there had been error in the failure of the trial judge to ask petitioner if he had anything to say, the error would have been deemed harmless under Rule 52, F.R. Crim. P., even if it had been raised on direct appeal. *A fortiori,* it does not furnish a basis for collateral attack, whether under Rule 35 or under 28 U.S.C. 2255.

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[7] Petitioner's appeal from his conviction was dismissed for want of diligent prosecution, and he brought two earlier motions to vacate judgment, both appealed. See *Green* v. *United States,* 238 F. 2d 400 (C.A. 1); *Green* v. *United States,* 256 F. 2d 483 (C.A. 1), certiorari denied, 358 U.S. 854. See *supra,* pp. 5–6.

As we discuss in Point III, *infra*, pp. 40–43, the remedy under Rule 35 to correct an illegal sentence is a narrow one—to bring an illegal sentence, which the judgment did not authorize, into conformity with the law. Petitioner's sentence was within the power of the court to impose and was within the maximum permitted by the statute. The error which he urges was at most a minor defect in procedure at the time of sentencing. This is not the kind of illegality to which Rule 35 refers when it says that an "illegal sentence" may be corrected *at any time*. There may have been error, but the sentence was not "illegal."

Neither does petitioner's application lie under the broader remedy by way of collateral attack available under 28 U.S.C. 2255, as a substitute for habeas corpus. See *Mixon* v. *United States*, 214 F. 2d 364 (C.A. 5). The scope of collateral attack was delineated by this Court in *Sunal* v. *Large*, 332 U.S. 174, and does not require much elaboration in relation to the present problem. Only under very unusual circumstances are procedural trial errors, correctible on appeal, a basis for collateral attack. Here, if there was error at all, it was error which went to fundamentals in such a minor way that it is doubtful that it would have been reversible on appeal. It does not begin to approach, in its potential effect, the seriousness of the incorrect trial ruling in *Sunal* v. *Large* that a defendant could not offer a defense which, under subsequent decisions, should have been available to him. Even that kind of error was deemed correctible only by direct appeal, and not on collateral attack. The error here, therefore, was, at most, a point which

could have been raised on direct appeal," and which therefore does not furnish a basis for collateral attack in any form."

II

THE TWENTY-FIVE-YEAR SENTENCE FOR THE AGGRAVATED FORM OF BANK ROBBERY WAS PROPERLY ALLOWED TO STAND

In his second motion under Rule 35 now before the Court (No. 179), petitioner argues that, when the trial court imposed a 20-year sentence for entry into the bank to rob, it exhausted its power to sentence, and therefore that his 25-year sentence, for the aggravated form of the offense, should not be allowed to stand. This position has no support in principle or in the reported decisions. The total offense of which petitioner was found guilty was one having two elements—robbing a bank and putting life in jeopardy. The only sentence which embraces those two elements is the 25-year sentence for the aggravated form of the crime. That is the valid sentence for the total offense

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[a] The holding by the District of Columbia Circuit in *Couch*, *supra*—that, even though the rule espoused by petitioner here should be applied in future trials, failure to follow that practice in the past would not be ground for overturning the sentence or conviction—shows, we believe, that that circuit does not regard the error, if there be one, as of the type which is so basic that it can always be raised collaterally.

[b] If the Court should hold adversely to the government on the issue under Rule 32(a), the result would be not to invalidate the judgment, but merely to have petitioner brought before the district court for resentencing. Since the error occurred after verdict and in no sense affects the verdict, the only relief to which petitioner would be entitled would be resentencing. See *In re Bonner*, 151 U.S. 242.

which the jury found that petitioner committed, and it is the sentence which accurately reflects the intent of the trial judge.

A. THE TWENTY-FIVE-YEAR SENTENCE FOR THE AGGRAVATED FORM OF THE OFFENSE IS THE ONLY ONE WHICH COVERS THE TOTAL OFFENSE WHICH THE JURY FOUND PETITIONER HAD COMMITTED

It has been settled since this Court's decision in *Holiday* v. *Johnston*, 313 U.S. 342, that the provision authorizing a twenty-five-year sentence where life is put in jeopardy during the course of a bank robbery does not define an offense separate from the bank robbery; it merely authorizes increased punishment where an additional fact, putting life in jeopardy, is shown to have occurred during the robbery. Hence, whether those two aspects are charged in one count or in two, a jury must find the two elements of (1) the robbery (or entry with intent to commit a robbery) and (2) the putting of life in jeopardy. A twenty-five-year sentence is authorized only if the verdict reflects both of those elements. The only verdict here which reflects the total offense, embracing these two factors, is the verdict on Count 3 for the aggravated form of the offense.

This is not a situation in which two counts charged alternative ways of committing the same offense, as in other instances where this Court has held that consecutive sentences cannot be imposed. For example, under the decision of this Court in *Prince* v. *United States*, 352 U.S. 322, 329, holding that Congress did not intend to impose separate punishment for entering a bank with intent to commit a felony and for the com-

pleted robbery (or theft), either a charge of entry or a charge of theft will support a judgment. But here we are not confronted with alternatives. Neither entry into the bank nor the completed robbery is an alternative form of the offense of aggravated robbery; both supply merely one element of the aggravated form. The other element of the aggravated offense—putting life in jeopardy—must also be found by the jury before a twenty-five-year sentence can be imposed. Thus, as we have said, the only count which reflects the total offense in this case is Count 3.

The situation here is the same as if the court had actually said, in sentencing on Count 3: "I think you should be punished 20 years for the robbery and an additional 5 years for putting life in jeopardy." This is, in actuality, what the court did. The judge was quite aware that the third count did not charge a separate offense; in his charge to the jury he said (R. No. 179, p. 9):

> The third count is a different type of count. That is not a separate offense. I will speak to you later of the manner in which you will handle the third count. That is not a separate offense. What the Government charges in that count, count 3, is they committed the robbery, the offense charged in count 2, in an aggravated manner. That is, they assaulted and put in jeopardy lives of certain persons by the use of a dangerous weapon. That is not a separate count, to repeat, that is an aggravation of the second count, robbing the bank.

In sum, while it would have been more technically accurate to sentence only on Count 3, rather than

imposing concurrent sentences on the other counts, it is clear that the trial judge did not and could not have exhausted his sentencing power when he imposed sentences on the first two counts, since those counts did not charge the whole offense which the jury found to have been committed by petitioner.[10]

In none of the cases that have arisen since *Holiday* v. *Johnston*, 313 U.S. 342, has the power to sentence for the aggravated form of the offense been deemed curtailed by the fact that a sentence—concurrent or not—has previously been imposed for the unaggravated form. *E.g.*, *Hewitt* v. *United States*, 110 F. 2d 1 (C.A. 8), certiorari denied, 310 U.S. 641; *O'Keith* v. *United States*, 158 F. 2d 591 (C.A. 5); *Remine* v. *United States*, 161 F. 2d 1020 (C.A. 6), certiorari denied, 331 U.S. 862; *United States* v. *Di Canio*, 245 F. 2d 713 (C.A. 2), certiorari denied, 355 U.S. 874; *Lowe* v. *United States*, 257 F. 2d 409 (C.A. 6). The theory of exhaustion of power through imposition of a sentence for the non-aggravated form has been rejected by practically every court of appeals in which it has been urged. See, in addition to the decision

[10] Since the sentences on the first two counts run concurrently with the third, the court below found it unnecessary, at this late date, to order them vacated. Vacation of the concurrent sentences affects neither good time allowances nor eligibility for parole. *Clark* v. *United States*, 267 F. 2d 99 (C.A. 4); 18 U.S.C. 4202. Multiplicity of crimes is a factor which a parole board may and probably does consider in determining whether parole is justified, but parole officers with extensive knowledge in this field know the difference between sentences on concurrent counts relating to one robbery and counts relating to separate transactions.

below, *Duboice* v. *United States*, 195 F. 2d 371 (C.A. 8); *Gebhart* v. *United States*, 163 F. 2d 962 (C.A. 8); *Gebhart* v. *Hunter*, 184 F. 2d 644 (C.A. 10); *Larson* v. *United States*, 172 F. 2d 386 (C.A. 6); see also *Stevenson* v. *Johnston*, 72 F. Supp. 627 (N.D. Cal.), affirmed, 163 F. 2d 750 (C.A. 9), certiorari denied, 333 U.S. 832."

B. SINCE THE TWENTY-FIVE-YEAR SENTENCE REFLECTS THE JUDGMENT OF THE TRIAL COURT AS TO THE PROPER PUNISHMENT FOR THE TOTAL OFFENSE, IT SHOULD BE ALLOWED TO STAND

The twenty-five-year sentence should be allowed to stand because it obviously represents the intent of the trial judge as to the merited punishment for the total crime which the jury found that petitioner had committed, regardless of which count came first or second. As explained above (*supra*, p. 36), that intent is explicit since the judge recognized and told the jury that the third count represented merely an aggravated form of the offense. When a judge imposes

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[11] *Holbrook* v. *Hunter*, 149 F. 2d 230 (C.A. 10), relied upon by petitioner, does not support his theory. In that case, while the twenty-year sentence on a first count was upheld as against a five-year sentence on a second count, both counts contained language alleging (in effect) an aggravated offense. The court did note (p. 232) that "the most that can be said is that when the court imposed the sentence of 20 years on count one, it exhausted its power to sentence," but this was later explained by the Tenth Circuit as being limited to a situation where both counts charge facts bringing them within the purview of the aggravated offense. *Gebhart* v. *Hunter*, 184 F. 2d 644 (C.A. 10). See, also, *Miller* v. *United States*, 147 F. 2d 372 (C.A. 2), where the theory of exhaustion is alluded to without comment or authority, and *United States* v. *Harris*, 97 F. Supp. 154 (D. Mo.), containing dictum in support of the theory.

concurrent sentences on separate counts arising out of a closely related transaction (whether technically one offense or two), he is sentencing on the total transaction. It may be a matter of pure accident on which count sentence is first pronounced. Whichever comes first, the intent to impose the longer sentence for the total offense is clear.

The primary responsibility for sentencing in our system of criminal law rests with the trial judge. The sentence which best represents his judgment as to proper punishment is the sentence which should be allowed to stand. Accordingly, reviewing courts have recognized the need to give effect to the obvious intention of the trial judge, even though on strict technical reasoning the lesser sentence has been imposed on what might seem to be the greater offense. Thus, where a longer sentence has been imposed for the robbery rather than for the aggravated form of the offense, the sentence for the aggravated form has been vacated. *Holbrook* v. *United States*, 136 F. 2d 649 (C.A. 8); *Coy* v. *United States*, 156 F. 2d 293 (C.A. 6), certiorari denied, 328 U.S. 841. Where a defendant has been given a longer sentence on a count charging entry (subject to a maximum of 20 years) than on another count charging a completed larceny (subject to a 10-year sentence), the courts have allowed the longer sentence for entry to stand. *Purdom* v. *United States*, 249 F. 2d 822, 826 (C.A. 10), certiorari denied, 355 U.S. 913; *United States* v. *Williamson*, 255 F. 2d 512 (C.A. 5), certiorari denied, 358 U.S. 941; *United States* v. *Leather*, 271 F. 2d 80 (C.A. 7), certiorari denied, 363 U.S. 831; *Audett* v.

United States, 265 F. 2d 837 (C.A. 9), certiorari denied, 361 U.S. 815. Justice and reason dictate that the manifest intention of the trial judge should control as to which of two or more sentences, contemporaneously imposed, shall be eliminated in order not to subject the defendant to the possibility of double punishment. As this Court said in *Bozza* v. *United States*, 330 U.S. 160, 166–167, "The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner."

III

PETITIONER MAY NOT RAISE IN THIS PROCEEDING THE QUESTION OF THE INSTRUCTIONS TO THE JURY ON THE AGGRAVATED FORM OF BANK ROBBERY

Petitioner urges, finally, in his second motion pursuant to Rule 35 (No. 179), that the trial court (1) failed to instruct the jury that, in order to convict of aggravated robbery on Count 3, it must find that the defendants put the lives of persons in "danger" of harm from the use of a dangerous weapon, (2) incorrectly instructed that the jury need only find under this count that lives were put in "fear," and (3) incorrectly instructed that the jury need not deliberate as to Count 3. Realizing that alleged error in instructions is not a basis for collateral attack, petitioner does not in terms argue that the instructions were erroneous or challenge the validity of the conviction on Count 3 (Pet. Br. 35). He does, however, attempt to do so indirectly by arguing that the aggravated offense was not defined for the jury, and there-

fore that the conviction on Count 3 must have been one for simple robbery, subject to a maximum of 20 years. Apart from the fact that his contentions as to the instructions are lacking in merit, we submit that his complaint still remains one that cannot be raised in a collateral proceeding.

A. THE ALLEGEDLY ERRONEOUS INSTRUCTIONS DO NOT RENDER THE SENTENCE ILLEGAL WITHIN THE MEANING OF RULE 35

The relief prescribed by the first part of Rule 35 is available only to correct an *illegal* sentence. *Heflin* v. *United States*, 358 U.S. 415; *Cuckovich* v. *United States*, 170 F. 2d 89 (C.A. 6), denied certiorari, 336 U.S. 905. Sentences subject to correction under the Rule include those which the judgment of conviction did not authorize (*United States* v. *Morgan*, 346 U.S. 502; *United States* v. *Bradford*, 194 F. 2d 197 (C.A. 2)), and others in which there is need for bringing an improper *sentence* into conformity with the law. *Cook* v. *United States*, 171 F. 2d 567 (C.A. 1), certiorari denied, 336 U.S. 926; *Duggins* v. *United States*, 240 F. 2d 479 (C.A. 6); *Fooshee* v. *United States*, 203 F. 2d 247 (C.A. 5).

The illegal sentence referred to in Rule 35 is one in which the illegality can be shown from the common law record, *i.e.*, the common law judgment roll (mainly the indictment, the plea, the verdict, and the sentence). See *McIntosh* v. *Pescor*, 175 F. 2d 95 (C.A. 6).[12] The Advisory Committee Notes show

[12] See, also, *United States* v. *Bradford*, 194 F. 2d 197 (C.A. 2); *United States* v. *Zisblatt*, 172 F. 2d 740 (C.A. 2).

that, in providing that the court may correct an illegal sentence *"at any time"*, the Rule continued existing law; and the then existing law as to illegal sentences stemmed from the common law. What was an illegal sentence at common law is discussed in *United States* v. *Mayer*, 235 U.S. 55, in explaining the exceptions to the common law doctrine that a court could not set aside or alter its judgment after the expiration of the term at which it was entered. The Court said (235 U.S. at 68):

> * * * In criminal cases * * * error would lie in the King's Bench whether the error was in fact or law. Tidd, 1137; 3 Bac. Abr. (Bouv. ed.) "Error" 366; Chitty, Crim. L. 156, 749. See *United States* v. *Plumer*, 3 Cliff. 28, 59, 60. The errors of law which were thus subject to examination were only those disclosed by the record, and as the record was so drawn up that it did not show errors in the reception or rejection of evidence, or *misdirections by the judge*, the remedy applied "only to that very small number of legal questions" which concerned "the regularity of the proceedings themselves." See Report, Royal Commission on Criminal Code (1879), p. 37; 1 Stephen, Hist. Crim. L. 309, 310. [Emphasis added.] [13]

It is thus clear that instructions are not part of the common law record.

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[13] *Mayer* held that error involving the bias of a juror could not be heard in a federal court by motion after the expiration of the term in which judgment was entered. The Court held the remedy, if any, was by writ of error or motion for a new trial.

It follows that claimed error as to instructions cannot bring a case within the scope of this narrow remedy under Rule 35, no matter how the asserted error is rephrased. In *Sunal* v. *Large*, 332 U.S. 174, 182, the Court ruled that error in a legal ruling on the availability of a defense could not be magnified to constitutional proportions by claiming that it deprived a defendant of the opportunity to defend himself. And as was said in *United States* v. *Bradford*, *supra*, 194 F. 2d at 201:

> Obviously it is an utterly untenable argument, as Magruder, J. said in *Cook* v. *United States*, *supra*, that, although the judgment has become unassailable [on direct appeal], the sentence may be "corrected" as "illegal" because of some error which vitiates the judgment.

For the purposes of Rule 35, the common law record in the instant case would show that petitioner was indicted under Count 3 for aggravated robbery; that the jury returned a verdict of guilty on Count 3; and that the sentence imposed was within the maximum provided by Congress for aggravated robbery. On the face of this record, therefore, petitioner's assumption that the jury returned a valid verdict on Count 3 for the simple offense of robbery cannot be accepted. His assertion that the verdict on Count 3 was entered in response to the court's charge would necessarily call for a review of those instructions. But since instructions are not a part of the record for the purposes of a motion under Rule 35, he may not use this procedure to obtain his desired end.

B. PETITIONER'S CHALLENGE TO THE INSTRUCTIONS IS NOT OTHERWISE A BASIS FOR COLLATERAL ATTACK

A proceeding under 28 U.S.C. 2255 has broader scope than one under Rule 35, but, even so, petitioner's attack on the instruction does not furnish a basis for invoking that remedy.

Instructions, if incorrect, constitute trial error, correctible on appeal and not collaterally. *Sunal* v. *Large*, 332 U.S. 174. Petitioner did not pursue his appeal which was dismissed "for want of diligent prosecution." This is not one of those classes of problems where, because of constitutional or jurisdictional involvements, collateral relief may be available "without consideration of the adequacy of relief by the appellate route". See *Sunal* v. *Large*, supra, 332 U.S. at 178. This is likewise not a situation where the facts relied upon were *dehors* the trial record and therefore not open to consideration and review on appeal. See *Waley* v. *Johnston*, 316 U.S. 101, 104. This is a simple case for direct review—the right to which petitioner has by his own inaction waived. Judicial opinion is unanimous that an attack on instructions cannot be presented by motion under 28 U.S.C. 2255. *United States* v. *Stevens*, 260 F. 2d 549 (C.A. 3); *Banks* v. *United States*, 258 F. 2d 318 (C.A. 9), certiorari denied, 358 U.S. 886; *Olson* v. *United States*, 234 F. 2d 956 (C.A. 4); *Adams* v. *United States*, 222 F. 2d 45 (C.A.D.C.); *Lopez* v. *United States*, 217 F.

2d 526 (C.A. 9); *United States v. Jonikas*, 197 F. 2d 675 (C.A. 7), certiorari denied, 344 U.S. 877.[14]

C. SINCE PETITIONER'S ALLEGATION OF ERRONEOUS INSTRUCTIONS LACKS MERIT, HE IS ENTITLED TO NO RELIEF IN ANY EVENT

Finally, petitioner's contentions that the court failed to charge as to the aggravated offense are lacking in merit and would not have provided grounds for relief even had they been urged as errors upon direct appeal.[15] The court's instruction did not take from the jury the duty of deliberating as to petitioner's guilt of the aggravated offense. The jury was told specifically that it must find guilt or innocence with respect to each count. See p. 10, *supra*. What the court did explain was that, since petitioner did not deny that a robbery had in fact taken place during which lives had in fact been placed in jeopardy (but only that he himself did not commit it), the facts developed relative thereto could be "put to one side". This was just another way of saying that these facts were not contested (as other important facts in the case were not contested). *Supra*, pp. 9–10. The jury could not have been misled into believing that this settled the matter; the last instruction given was

[14] In *Shelton* v. *United States*, 235 F. 2d 951 (C.A. 4), relied upon by petitioner, it could not be told whether the verdict, as announced by the foreman of the jury, followed the charges in the indictment or the charges as differently described in the trial court's instructions. The confusion was traceable to an error in those instructions. The court of appeals held, in view of the "extraordinary circumstances", that the intention of the jury as to the *verdict* was unclear.

[15] Petitioner made no objections at the trial to the alleged errors in instructions of which he now complains. See *Wong Tai* v. *United States*, 273 U.S. 77.

that guilt or innocence must be decided as to Count 1, Count 2, and Count 3.

For the same reason, the jury could not have been misled by what was an apparent slip of the tongue on the part of the court in repeating the issue under Count 3 as "did they rob the bank in aggravated circumstances, put in *fear* the life of a person by the use of a pistol?" (emphasis added) (see *supra*, p. 9). The jury had already been adequately instructed as to aggravated robbery; it had been told specifically that jeopardy meant *danger* (*supra*, pp. 8–9).[16] The error, if any, in the subsequent use of the word "fear" instead of "danger" would have been harmless in view of this earlier instruction and of the fact that it was never questioned that lives were put in danger and that a pistol was used—the only issue being whether petitioner was the robber who did so. These alleged errors could not have affected the result or in any way prejudicially affected petitioner. They would not afford a basis for reversal on direct appeal. See *Kotteakos* v. *United States*, 328 U.S. 750. They cannot now afford a basis for correcting or vacating the sentence. *Chadwick* v. *United States*, 170 F. 2d 986 (C.A. 5).

[16] Even in the later formulation using "fear" instead of "danger", the judge referred to "the use of a pistol"—a weapon universally regarded as not only evoking "fear" but as creating "danger." This was not a case in which the instrument used to commit the robbery might have evoked fear without also creating an objective danger.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgments of the courts below, affirming the orders of the district court denying petitioner's motions to correct sentence, should be affirmed.

J. LEE RANKIN,
Solicitor General.
MALCOLM RICHARD WILKEY,
Assistant Attorney General.
BEATRICE ROSENBERG,
JULIA P. COOPER,
Attorneys.

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